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**TRANSCRIPT OF RECORD**

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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1925**

**No. 299** ➤

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**THE EARLY & DANIEL COMPANY, APPELLANTS,**

**vs.**

**THE UNITED STATES**

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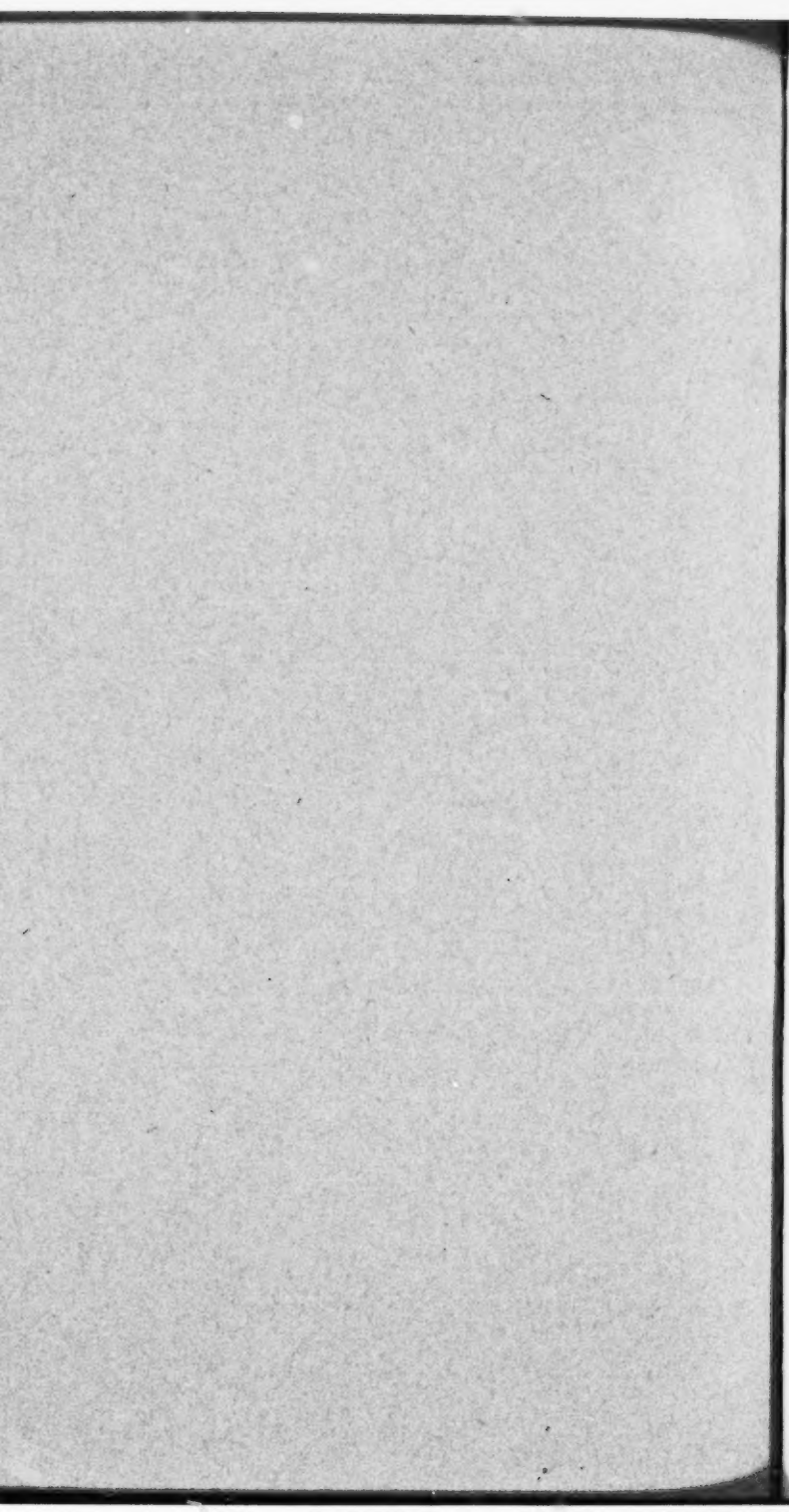
**APPEAL FROM THE COURT OF CLAIMS**

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**FILED FEBRUARY 27, 1925**

**(30,905)**



(30,905)

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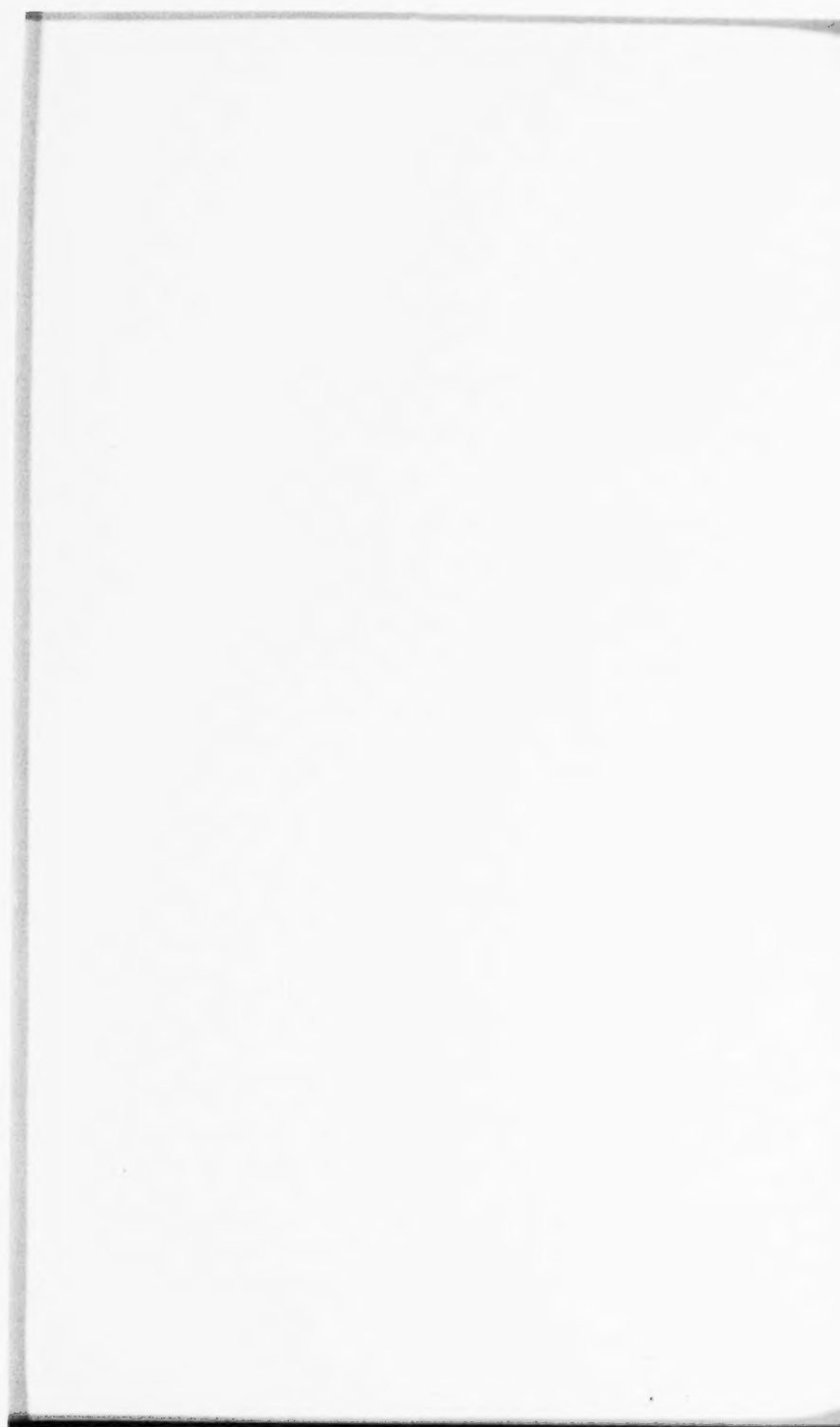
*vs.*

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APPEAL FROM THE COURT OF CLAIMS

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[fol. 1]

**IN THE COURT OF CLAIMS**

No. 238-A

THE EARLY &amp; DANIEL COMPANY, Plaintiff,

vs.

THE UNITED STATES OF AMERICA, Defendant

I. PETITION—Filed August 2, 1921

To the Honorable the Court of Claims:

Plaintiff is a corporation duly incorporated under the laws of the State of Ohio, having its principal office and place of business at Cincinnati, Ohio.

On or about the 31st day of July, 1917, the plaintiff entered into a contract with S. C. Vestal, Lieutenant-Colonel, Quartermaster Corps, United States Army, acting for and on behalf of the defendant, whereby the plaintiff agreed to furnish and deliver and the defendant agreed to buy from the plaintiff during the period commencing August 1, 1917, and ending September 30, 1917, [fol. 2] such hay as might be required during July and the first half of August of 1917, not to exceed 6,000,000 pounds, at 97½ cents per hundred pounds, and such hay as might be required during the last half of August and all of September, 1917, not exceeding 6,000,000 pounds, at 95 cents per hundred pounds, to be delivered f. o. b. cars at Newport News, Virginia, subject to call of the defendant in lots of not to exceed 1,000,000 pounds per lot. The said defendant made calls under said contract at divers times during the period from July 31 to September 30, 1917, which calls plaintiff complied with; and thereafter, on the 25th day of September, 1917, after it became impossible, owing to causes beyond the control of plaintiff, for plaintiff to furnish the hay referred to in said call, and when the defendant well knew that it was impossible for plaintiff to furnish the hay referred to in said call, defendant made call upon the plaintiff to furnish 4,000,000 pounds of hay, to be delivered September 30, 1917. Thereafter plaintiff refused to furnish said hay, and notified the Camp Quartermaster in charge of the receipt of hay at Newport News that it would refuse to furnish said hay. Thereafter, on November 15, 1917, the said Camp Quartermaster notified the plaintiff that, unless the hay specified in said call dated September 25, 1917, was delivered, purchases would be made in the open market and charged to the account of plaintiff. Thereafter, on November 21, 1917, plaintiff agreed that it would furnish the hay mentioned in the said call, under protest, and would take up the matter of price to be paid therefore with the proper authorities at Washington.

Plaintiff did thereafter furnish said 4,000,000 pounds of hay. The reasonable value of said hay, as furnished, at the time same was [fol. 3] furnished, was \$30.00 per ton, being \$60,000.00 in all.

The amount paid plaintiff was \$19.00 per ton, making \$38,000.00. By reason thereof the plaintiff claims the difference between said amounts, being \$22,000.00.

The claim of plaintiff has been duly presented to the Camp Quartermaster at Newport News, Virginia; to the Acting Quartermaster General at Washington, D. C.; to the Auditor for the War Department; to the Secretary of War; to the Comptroller of the Treasury, and to the Board of Contract Adjustment, and has been denied by all of said officers and by said Board.

Plaintiff is the sole owner of said claim; no assignment or transfer of said claim, or any part thereof, has been made, and plaintiff is justly entitled to the amount herein claimed after allowing all just credits and offsets.

Plaintiff has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted or given encouragement to rebellion against said Government or to any of its enemies.

Plaintiff believes that all the facts herein set out are true.

Francis B. James, Washington, D. C., Attorney of Record;  
Harmon, Colston, Goldsmith & Hoadley, Cincinnati, O.;  
Ewing H. Scott, Washington, D. C., of Counsel, Attorneys  
for Plaintiff.

[fol. 4] Sworn to by H. Lee Early. Jurat omitted in printing.

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[fol. 5] II. GENERAL TRAVERSE—Entered Oct. 3, 1921

No demurrer, plea, answer, counter-claim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

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### III. ARGUMENT AND SUBMISSION OF CASE

On October 22, 1924, this case was argued and submitted on merits by Mr. Ewing H. Scott, for the plaintiff, and by Mr. Edwin S. McCrary, for the defendant.

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[fol. 6] IV. **Findings of Fact, Conclusion of Law and Opinion of the Court by Hay, J.**—Entered November 3, 1924

This case having been heard by the Court of Claims, the court, upon the evidence makes the following

#### FINDINGS OF FACT

##### I

Plaintiff is a corporation duly incorporated under the laws of the State of Ohio, and having its principal office and place of business at

Cincinnati, Ohio. On or about the 31st day of July, 1917, pursuant to sealed proposals previously submitted, it entered into a contract with S. C. Vestal, Lieutenant-Colonel, Quartermaster Corps, United States Army, acting for and on behalf of the defendant, whereby the plaintiff agreed to furnish and deliver, and defendant agreed to buy from the plaintiff during the period commencing August 1, 1917, and ending September 30, 1917, such hay as might be required during July and the first half of August, 1917, and not to exceed six million pounds, at 97½ cents per one hundred pounds, and such hay as might be required during the last half of August and all of September, 1917, not exceeding six million pounds, at 95 cents per hundred pounds, to be delivered f. o. b. cars at Newport News, Va., subject to call of the defendant in lots of not to exceed one million pounds per lot.

The said contract is as follows:

#### "Contract for Supplies

between S. C. Vestal, Lieut. Colonel, Quartermaster Corps, U. S. A., and the Early & Daniel Co., Cincinnati, Ohio, for forage "hay" required at Newport News, Virginia. Date of contract July 31, 1917. Contract expires September 30, 1917. Sureties, the Aetna Casualty & Surety Company, \$25,000,000. Appropriation and amount S. S. & T., Q. M. C., F. Y. 1918, \$115,500.

"These articles of agreement entered into this 31st day of July, nineteen hundred and seventeen, between S. C. Vestal, Lieut. Colonel, Quartermaster Corps, United States Army, on the first part, for and in behalf of the United States of America, and the Early & Daniel Company, Cincinnati, Ohio (a corporation existing under the laws [fol. 7] of the State of Ohio), of Cincinnati, in the county of Hamilton and State of Ohio (hereinafter designated as contractor), of the second part. Witness: That the said parties do hereby mutually covenant and agree to and with each other—referring to any advertisement, circular to bidders, and specifications hereto attached or referred to herein, or pertaining hereto, and to samples referred to herein or in said advertisement, circular to bidders, or specifications, which, so far as they are applicable, form a part of this contract—as follows:

1. That the said contractor shall furnish and deliver during the period commencing August 1, 1917, and ending September 30, 1917, the following supplies for or at the military stations, in the manner and at the prices stated in this contract; deliveries to be made in such quantities, at such times, and in such bins, sheds, bunkers, or other places of storage at the military stations named, as may be required by the receiving officer or agent of the Quartermaster Corps, unless the minimum quantities to be delivered are stated, or different conditions as to place and time of delivery are expressly set forth in this contract, viz:

Twelve million (12,000,000) pounds of hay, No. 1 timothy, at the following prices:

6,000,000 lbs. @ \$0.97½ per cwt.

6,000,000 lbs. @ \$0.95 " "

F. o. b. cars Newport News, Va.

according to instructions to bidders and specifications for forage dated July 10th, 1917, attached hereto, which are hereby made a part hereof as fully as if written herein; subject to call of the party of the first part in lots of not to exceed one million pounds (1,000,000 lbs.) per lot, all to be delivered within three months from date of first call."

## II

Pursuant to the terms of the contract a call for five hundred thousand pounds of hay was made by the Government under date of August 15, 1917, this being the first call under the contract.

The delivery of the hay required under the first call was made immediately upon receipt of the call.

Following the first call subsequent calls were made as follows:

Call No. 2 for 1,050,000 pounds, dated August 20, 1917;

Call No. 3 for 2,000,000 pounds, dated September 5, 1917;

Call No. 4 for 4,450,000 pounds, dated September 12, 1917; and

Call No. 5 for 4,000,000 pounds, dated September 25, 1917.

## IV

Hay of an acceptable grade and in quantities sufficient to supply the needs of Newport News was not grown in the vicinity of Newport News, and it was necessary for plaintiff to look elsewhere for hay to fill the contract requirements.

The hay purchased and shipped to fill the contract was obtained mostly in Ohio.

During the contract period transportation conditions were very abnormal and plaintiff experienced numerous difficulties in securing deliveries at Newport News.

[fol. 8] Of 108 cars shipped by plaintiff to Newport News the average period in transit was 25½ days, the running time on the individual cars ranging from 5 to 10 days. Every effort was made by plaintiff to secure prompt movement of cars. To this end plaintiff, during the contract period, continuously sought the assistance of the officers in charge of the embarkation depot at Newport News, and other Government officials.

## V

The plaintiff delivered all the hay requested by defendant on calls numbered 2, 3, and 4 without making any protests that the calls were for amounts of hay greater than 1,000,000 pounds. The plaintiff did not at any time make any objection to the calls made upon it until the fifth call was made, and then for the first time the plaintiff objected that the call was for more pounds of hay than the contract allowed for any one call, and that objection was not made until it was too late for the defendant to amend the call. The plaintiff, after the fifth call was made, made arrangements to complete its



delivery of hay under the second, third, and fourth calls although each of these calls required the delivery of more than 1,000,000 pounds of hay.

## VI

On September 25, 1917, defendant made its fifth call on said contract for 4,000,000 pounds of hay and advised plaintiff of said call by telegram and by letter. Whereupon plaintiff's vice president, Mr. Terrell, immediately wrote Colonel Knight that the call was not deemed by plaintiff to be in accordance with the contract, and that plaintiff did not intend to fill it. The fifth call, dated September 25, 1917, asked for the delivery of 4,000,000 pounds of hay by September 30, 1917. It would have been impossible to deliver all of said hay by that time, but under terms of the contract plaintiff had until November 15, 1917, being three months from the date of the first call, August 15, 1917, to complete its deliveries of hay on this contract. This could have been done as plaintiff's deliveries of hay on this contract averaged  $25\frac{1}{2}$  days from date of call, and plaintiff had 51 days within which to complete deliveries of hay upon the fifth call.

## VII

Plaintiff's vice president, Mr. Terrell, visited Newport News on October 4, 1917, for the purpose of investigating the situation with respect to a claimed shortage of hay, and after making arrangements for delivery to the camp of the amount of hay necessary to make up the full 8,000,000 pounds of hay called for under the first four calls, advised Colonel Knight that plaintiff did not intend to fill the fifth call for 4,000,000 pounds.

## VIII

Nothing further was said about filling the fifth call until November 9, 1917, when plaintiff received the following telegram from Colonel Knight:

[fol. 9] "Records here show that there are over 5,000,000 pounds of hay still due on your contract of August third last. Only two car-loads have been received since November first. Request immediate wire advice as to your intentions as to completing of this contract."

Immediately upon receipt of the above telegram plaintiff's vice president wired the camp quartermaster that he would arrive at Newport News the following Sunday night and call on him early Monday morning. Mr. Terrell went to Newport News as indicated and after conferring with Colonel Knight asked him to give plaintiff time to put the matter up to Washington for a decision, which he agreed to do. However, on November 15, the camp quartermaster again wired plaintiff that unless the hay specified in the fifth call was delivered, purchases would be made in the open market and charged to plaintiff's account.

In reply plaintiff immediately wired the camp quartermaster reiterating its intention to refer the matter to Washington, and again on November 19 the camp quartermaster wired to plaintiff as follows:

"Amount hay on hand will supply needs to December fourth. Require prompt delivery of four million pounds. Advise at once your action, otherwise must buy in open market."

After further exchange of telegrams plaintiff agreed on November 21, 1917, to fill the fifth call under protest and take the matter up with the proper authorities at Washington. The telegram from plaintiff to the camp quartermaster of November 21, 1917, reads as follows:

"We will start shipping hay immediately, and in case you need any before arrival will arrange to have Hiden loan us a supply. Want it distinctly understood that we are doing this under protest and are going to put the matter up to proper authorities in Washington; and if they rule in our favor, want settlement at fair market price for amount we overfill. Will you wire C. S. Ruttle, General Agent, D. B. C. & W. Railway, to furnish equipment immediately as we request for hay to ship to you? Answer."

#### IX

During the month of November, 1917, the railroad yards at Newport News were badly congested, and an embargo had been placed against further shipments to that point. There were several hundred cars of hay on the tracks. Owing to the congested conditions and the inability to make deliveries at Newport News, plaintiff made an arrangement with Mr. P. W. Hiden to deliver the 4,000,000 pounds of hay that plaintiff had agreed to furnish under protest.

#### X

At the time of the receipt by plaintiff of the camp quartermaster's telegram of November 19, 1917, advising that hay would be purchased in the open market and charged to plaintiff's account unless plaintiff agreed to promptly deliver 4,000,000 pounds of hay the Government owed plaintiff a considerable sum of money for hay delivered under the contract, and had not yet made settlement thereon.

[fol. 10]

#### XI

Plaintiff delivered under protest the 4,000,000 pounds of hay demanded by the camp quartermaster, and settlement has been made thereof at the contract price. The contract price was \$19 per ton, and the amount paid plaintiff for the 4,000,000 pounds of hay delivered was \$38,000, which amount was accepted without protest.

At the time of delivery the market price of hay was \$30 per ton. The market value of the 4,000,000 pounds of hay delivered was \$60,000.

## XII

After the plaintiff had accepted without protest the sum of \$38,000, which the Government paid to it under the contract the plaintiff filed its claim for \$22,000 with the Acting Quartermaster General of the United States Army, with the Auditor for the War Department, with the Secretary of War, with the Comptroller of the Treasury, and with the Board of Contract Adjustment, all of whom in turn decided that the claim could not be paid.

## CONCLUSION OF LAW

Upon the foregoing findings of fact the court decides as a conclusion of law that the plaintiff is not entitled to recover and that its petition be and the same is hereby dismissed. Judgment is awarded against the plaintiff in favor of the defendant for the cost of printing the record in this case, the amount thereof to be entered by the clerk and to be by him collected according to law.

## OPINION

HAY, Judge, delivered the opinion of the court.

This is a suit brought by the plaintiff against the United States to recover the sum of \$22,000.

The material facts are that on the 31st day of July, 1917, the plaintiff entered into a written contract with the United States whereby it agreed to furnish and deliver 12,000,000 pounds of hay to the United States, f. o. b. cars Newport News, Va., at the following prices, 6,000,000 pounds @ \$0.97½ per cwt. and 6,000,000 pounds @ \$0.95 per cwt. The delivery of said hay was subject to call of the United States in lots of not to exceed one million pounds per lot, all to be delivered within three months from date of the first call. The first call was made on August 15, 1917, and was for 500,000 pounds of hay, which was delivered. The second call was made on August 20, 1917, and was for 1,050,000 pounds of hay, the third call was made on September 5, 1917, and was for 2,000,000 pounds of hay, the fourth call was made on September 12, 1917, and was for 4,450,000 pounds of hay, all of which hay was delivered. Thus the second, third, and fourth calls were made for more than the 1,000,000 pounds of hay, which the contract provided should be the quantity to be called for at any one time. These three calls were all received by the plaintiff, and the hay was delivered by it without objection or protest as to the quantity called for.

[fol. 11] The fifth call was made on September 25, 1917, for 4,000,000 pounds of hay, and on October 4, 1917, four days after the contract expired the plaintiff refused to deliver the hay upon the ground that the contract provided that only 1,000,000 pounds of hay could be called for at any one time.

The plaintiff under the provisions of the contract had ample time in which to make delivery of the hay as it had three months to

complete such delivery from the date of the first call, which was on August 15, 1917.

The plaintiff having refused to deliver the hay, the Government after some correspondence informed the plaintiff that if the hay was not delivered under the contract it would buy hay in the open market for plaintiff's account. Thereupon the plaintiff delivered the hay under the contract in the latter part of November and the first of December 1917, but protested against the delivery at contract prices, and notified the defendant that it would take the matter up with the authorities at Washington, and if they should rule in its favor that it wanted a settlement at fair market price. This the plaintiff did, but the authorities in Washington ruled against it. Whereupon the plaintiff accepted the market price for the 4,000,000 pounds of hay without protest at the time of its acceptance of the contract price, and has now brought this suit for the amount which it claims is the difference between the contract price and the market value of the hay.

The plaintiff would have been within its rights under the contract if it had adhered to its refusal to deliver the 4,000,000 pounds of hay, but it did not do so. It went ahead and voluntarily delivered the hay under the terms of its contract and thereby waived the provisions of the contract upon which it could have relied. It does not appear that there was any duress or compulsion exercised by the defendant against the plaintiff.

The last call was made specifically with reference to the contract. The delivery was made under the provisions of the contract, and the protest made by the plaintiff was not regarded by the defendant. The situation was that the plaintiff had the option of delivering the hay under the terms of the contract or of not delivering it at all. It chose to deliver under the terms of the contract. The matter of price was not left open by the defendant; on the contrary, it tendered the contract price, which was accepted by the plaintiff. It must be held that the plaintiff voluntarily accepted the call for 4,000,000 pounds of hay, and that it delivered the hay at the contract price. *Willard, Sutherland & Company, v. United States*, 262 U. S. 489. *William C. Atwater & Co. Inc. v. United States*, 262 U. S. 495. *Charles Nelson Company v. United States* 261 U. S. 17.

The petition of the plaintiff must be dismissed. It is so ordered.

Graham, Judge; Downey, Judge; Booth, Judge; and Campbell, Chief Justice, concur.

[fol. 12]

#### V. JUDGMENT

At a Court of Claims held in the City of Washington on the 3rd day of November, A. D., 1924, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the defendant, and do order and adjudge that the plaintiff as

aforesaid, is not entitled to recover and shall not have and recover any sum in this action of and against the United States; and that the petition herein be and the same hereby is dismissed: And it is further ordered and adjudged that the United States shall have and recover of and from the plaintiff, as aforesaid, the sum of One hundred and forty-one dollars and seventy cents (\$141.70) the cost of printing the record in this court, to be collected by the Clerk, as provided by law.

By the Court.

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#### VI. SUBSTITUTION OF ATTORNEY

On suggestion of the death of Francis B. James, attorney of record, and on motion made therefor, Ewing H. Scott was substituted as attorney of record, by the court, on February 2, 1925.

[fol. 13] VII. PETITION FOR APPEAL—Filed January 26, 1925

Now comes the plaintiff, The Early and Daniel Company, by Ewing H. Scott, its attorney, make application to the Honorable Court of Claims for an appeal from the court's decision in the above-entitled case, decided November 3, 1924, to the Supreme Court of the United States.

Respectfully submitted, Ewing H. Scott, Attorney for Plaintiff.

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#### VIII. ORDER ALLOWING APPEAL

It is ordered by the court this 2d day of February, 1925, that the plaintiff's application for appeal be and the same is allowed.

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[fol. 14] IX. COURT OF CLAIMS OF THE UNITED STATES

[Title omitted]

#### CLERK'S CERTIFICATE

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law and opinion of the court by Hay, J.; of the judgment of the court; of the substitution of attorney; of the plaintiff's application for appeal; of the order of the court allowing plaintiff's application for appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 10th day of February, 1925.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of the Court of Claims.)

Endorsed on cover: File No. 30,905. Court of Claims. Term No. 299. The Early & Daniel Company, appellants, vs. The United States. Filed February 27th, 1925. File No. 30,905.

(6094)